



MATERIALS FOR
INTERNATIONAL TRADE REGULATION

INTERNATIONAL TRADE: LEGAL ORDER AND POLITICAL ECONOMY

By Michael J. Trebilcock and Robert Howse

Faculty of Law, University of Toronto

VOLUME I

May 1993

First Draft

For Routledge, Publishers

BORIS TRILIN LAW LIBRARY
UNIVERSITY OF TORONTO

MATERIALS FOR
INTERNATIONAL TRADE REGULATION

INTERNATIONAL TRADE: LEGAL ORDER AND POLITICAL ECONOMY

By Michael J. Trebilcock and Robert Howse


Faculty of Law, University of Toronto

VOLUME I

May 1993

First Draft

For Routledge, Publishers



Digitized by the Internet Archive
in 2018 with funding from
University of Toronto

TABLE OF CONTENTS

CHAPTER I:	THE EVOLUTION OF INTERNATIONAL TRADE THEORY AND POLICY
CHAPTER II:	THE BASIC ELEMENTS OF THE GATT, THE CANADA-U.S. FREE TRADE AGREEMENT, NAFTA AND THE EUROPEAN COMMUNITY
CHAPTER III:	TRADE, EXCHANGE RATES AND BALANCE OF PAYMENTS
CHAPTER IV:	TARIFFS, THE MFN PRINCIPLE, AND REGIONAL TRADING BLOCKS
CHAPTER V:	ANTIDUMPING LAWS
CHAPTER VI:	SUBSIDIES AND COUNTERVAILING DUTIES
CHAPTER VII:	TRANSITION COSTS: SAFEGUARD REGIMES AND DOMESTIC ADJUSTMENT AND LABOUR POLICIES
CHAPTER VIII:	TRADE IN AGRICULTURE
CHAPTER IX:	TRADE IN SERVICES
CHAPTER X:	TRADE-RELATED INTELLECTUAL PROPERTY (TRIPS)
CHAPTER XI:	TRADE AND INVESTMENT
CHAPTER XII:	TRADE AND DEVELOPING COUNTRIES
CHAPTER XIII:	TRADE AND THE ENVIRONMENT
CHAPTER XIV:	THE INTERNATIONAL MOVEMENT OF PEOPLE
CHAPTER XV:	DISPUTE RESOLUTION IN INTERNATIONAL TRADE
CHAPTER XVI:	CONCLUSION: FUTURE CHALLENGES AND PROSPECTS FOR THE GLOBAL TRADING ORDER

CHAPTER I: THE EVOLUTION OF INTERNATIONAL TRADE THEORY AND POLICY

I AN INTELLECTUAL HISTORY OF INTERNATIONAL TRADE THEORY . . . 1

1. The Theory of Absolute Advantage 1

2. The Theory of Comparative Advantage 3

3. The Factor Proportions Hypothesis 6

4. The Product Cycle Theory 8

5. Qualifications to the Case for Free Trade 10

a. Reciprocity 10

b. The Optimal Tariff 13

c. Infant Industries 14

d. Strategic Trade Theory 15

e. Revenue-Raising Considerations 17

f. National Security Considerations 17

6. Objections to Free Trade 18

a. Impact on Employment 18

b. Impact on Social Policies 19

c. Impact on Cultural Diversity 20

d. Impact on Domestic Political Sovereignty 22

7. Public Choice Theory and the Politics of Trade Liberalization 23

II AN INSTITUTIONAL HISTORY OF INTERNATIONAL TRADE POLICY . . 28

1. The Advent of Free Trade 28

2. The Decline of the International Trading Order 34

3. The Formation and Evolution of the GATT 36

4. The Formation of Regional Trading Blocs 39

CHAPTER II: THE BASIC ELEMENTS OF THE GATT, THE CANADA-U.S. FREE TRADE AGREEMENT, NAFTA AND THE EUROPEAN COMMUNITY

I THE GENERAL AGREEMENT ON TARIFFS AND TRADE (GATT) 1

1. Tariffs 1

2. The Principle of Non-Discrimination 3

(a) The Most-Favoured-Nation (MFN) Principle 4

(b) The National Treatment Principle 8

3. Quantitative Restrictions 9

(a) Exceptions to Article XI 10

	(b) The Safeguard Provision	10
4.	Trade Remedy Laws	12
5.	State Trading Enterprises	15
6.	Less Developed Countries	17
7.	General Exceptions to GATT Obligations	19
8.	The Governance of the GATT	19
II	THE CANADA-U.S. FREE TRADE AGREEMENT	23
1.	History	23
2.	Trade in Goods	25
3.	Investment	28
4.	Trade in Services	30
5.	Institutional Provisions	31
III	THE NORTH AMERICAN FREE TRADE AGREEMENT (NAFTA)	33
1.	Trade in Goods	33
2.	Trade in Services	36
3.	Investment	36
4.	Competition Policy, Monopolies, and State Enterprises	37
5.	Intellectual Property	37
6.	Institutional Arrangements	37
IV	THE FRAMEWORK OF ECONOMIC UNION IN THE EUROPEAN COMMUNITY	39
1.	Non-discrimination norms vs. legitimate public purposes	43
2.	State Aids	45
3.	Harmonization	46
4.	Maastricht Treaty	48

CHAPTER III: TRADE, EXCHANGE RATES, AND THE BALANCE OF PAYMENTS

I	INTRODUCTION	1
II	THE INTERACTION OF TRADE AND FINANCE AND THE LEGAL ORDER OF BRETTON WOODS	7
1.	Liquidity, Adjustment and Substitutability	8
a.	The GATT	8
b.	The IMF	13
2.	Transaction Costs of Non-Protectionist Domestic Measures	15
3.	Interaction between the GATT and IMF Rules	15
4.	Volatility	17
5.	Macroeconomic Policy Coordination and Proposals for Managed	

	Exchange Rates	19
	a. The European Monetary System	20
	b. Is There an Optimal Type of Exchange Rate Regime from the Perspective of Liberal Trade?	24
III	CONCLUSION	25
 CHAPTER IV: TARIFFS, THE MFN PRINCIPLE, AND REGIONAL TRADING BLOCKS		
I	THE ECONOMIC EFFECTS OF A TARIFF	1
II	THE MOST FAVOURED NATION PRINCIPLE	4
III	ALTERNATIVE BARGAINING STRUCTURES	8
	1. Product-by-Product Negotiations	8
	2. Linear-cuts with Exceptions	10
	3. Sector-by-Sector Negotiations	11
	4. Non-Reciprocal Concessions	12
IV	OUTSTANDING TARIFF ISSUES	13
V	DOMESTIC ADMINISTRATION OF TARIFFS	16
	1. Valuation	17
	2. Classification	22
	3. Rules of Origin	24
	4. Customs Fees	26
VI	MULTILATERALISM VERSUS REGIONALISM	27
 CHAPTER V: ANTIDUMPING LAWS		
I	INTRODUCTION	1
II	THE GATT PROVISIONS ON ANTIDUMPING	2
	1. The Kennedy Round Antidumping Code	3
	2. The Tokyo Round Antidumping Code	4
	3. The Uruguay Round Antidumping Proposals	5
III	ANTIDUMPING LAWS: CANADA, THE UNITED STATES AND THE EC . .	7
	1. History and Background	7
	2. Institutional Arrangements	8

3.	Substantive Law	10
a.	Dumping	10
b.	Normal/Fair Value	10
c.	Home-Market Method	11
d.	Constructed-Cost Method	13
e.	Third-Country Method	15
f.	Export Price Calculation	16
g.	Injury	17
h.	Domestic Industry and Like Goods	18
i.	Material Injury	19
j.	Causation	20
4.	Procedure	22
a.	Standing of Complainants	22
b.	Preliminary Investigation	23
c.	Formal Investigation	24
d.	Assessment of Antidumping Duties	26
e.	Public Interest Considerations	30
f.	Rights of Appeal	31
IV	THEORETICAL RATIONALES FOR ANTIDUMPING LAWS	32
1.	Economic Rationales For Antidumping Laws	32
a.	International Price Discrimination	32
b.	Predatory Pricing	37
c.	Intermittent Dumping	43
2.	Non-Efficiency Rationales For Prohibiting Dumping	46
V	REFORMING ANTIDUMPING LAWS	49
VI	THE INTERFACE BETWEEN TRADE AND COMPETITION POLICIES	52
 CHAPTER VI: SUBSIDIES AND COUNTERVAILING DUTIES		
I	INTRODUCTION	1
II	GATT PROVISIONS ON SUBSIDIES	4
1.	Article VI	4
2.	Article XVI	5
3.	The Tokyo Round Subsidies Code	6
a.	Track I	7
b.	Track II	9
c.	Treatment of Developing Countries	12

III	DOMESTIC ADMINISTRATION OF COUNTERVAILING DUTY LAWS . . .	14
1.	Institutional Context	14
2.	Substantive Law	15
a.	Subsidies	15
b.	Export Subsidies	16
c.	Domestic Subsidies: The Specificity Test	17
d.	Calculation of Countervailing Duties	21
e.	Injury	23
f.	Domestic Industry	23
g.	Material Injury	25
h.	Causation	26
3.	Rights of Appeal	27
IV	RATIONALES FOR EXISTING LAWS	29
1.	Efficiency Rationale	29
2.	Fairness Rationales	33
a.	The Level Playing Field Rationale	33
b.	Unfair Impact Rationales	38
V	REFORM OF SUBSIDY LAWS	40
1.	First-Best Reforms	41
a.	Conceptual Problems with Countervailing Duty Laws	41
i.	Developing a Taxonomy of Subsidies	41
ii.	The Cash Flow Approach	43
iii.	The Entitlement Approach	45
b.	An Alternative to Countervailing Duty Law	48
2.	Second-Best Reforms	52

CHAPTER VII: TRANSITION COSTS: SAFEGUARD REGIMES AND DOMESTIC ADJUSTMENT AND LABOUR POLICIES

I	THE GATT SAFEGUARD REGIME	1
1.	Introduction	1
2.	History and Background	2
3.	Substantive Requirements	4
a.	Increased Imports	5
b.	Serious Injury	6
c.	Remedy and Compensation	7
4.	Other Escape Clauses	9
5.	Theoretical Rationales for The Safeguard Regime	10
a.	Trade Liberalization	10
b.	Economic Adjustment	12
c.	Non-Economic Rationales	14

6.	Reforming Safeguard Laws	15
a.	Selectivity	16
b.	Injury	21
c.	Surveillance	24
d.	Compensation	24
e.	Duration	25
f.	Grey-Area Measures	26
g.	Conclusion	27
II	DOMESTIC ADJUSTMENT ASSISTANCE POLICIES	28
1.	Industrial Subsidies	28
2.	Labour Market Adjustment Policies	30
3.	Labour Standards, Free and "Fair" Trade	39
III	CONCLUSION	47

CHAPTER VIII: TRADE IN AGRICULTURE

I	INTRODUCTION	1
II	TRADE IN AGRICULTURE AND THE EXISTING LAW OF THE GATT . . .	2
1.	Historical Origins of Special Treatment for Agriculture	2
2.	Quantitative Restrictions	3
3.	Export Subsidies	6
4.	Domestic Subsidies and Related Domestic Support Measures	9
5.	Health and Other Technical Standards	10
III	FTA AND NAFTA	12
IV	RATIONALES FOR DIFFERENTIAL TREATMENT OF THE AGRICULTURAL SECTOR: A CRITICAL OVERVIEW	13
1.	Self-Sufficiency/National Security	13
2.	Abnormal Price Instability	14
3.	Preservation of the Rural Way of Life/Environment	14
V	INSTRUMENTS OF AGRICULTURAL PROTECTION	16
1.	Domestic Price Control and Supply Management Systems	16
a.	The European Community (CAP)	16
b.	North America	18
c.	Japan	20
i.	Costs and Benefits of Agricultural Protection	20
VI	THE POLICY CHALLENGES OF LIBERALIZATION	24

VII	THE DRAFT URUGUAY ROUND AGREEMENT AND TRADE IN AGRICULTURE	29
1.	Measuring, Restructuring and Reducing Protection	29
2.	Technical Barriers	31
	CONCLUSION	32

CHAPTER IX: TRADE IN SERVICES

I	INTRODUCTION	1
II	THE NATURE OF SERVICES	3
III	BARRIERS TO TRADE IN SERVICES	7
1.	Direct and Facially Discriminatory Barriers to Trade in Services	7
2.	Indirect and Facially Discriminatory Barriers to Trade in Services	8
3.	Direct but Facially Neutral Barriers to Trade in Services	8
4.	Indirect and Facially Neutral Barriers to Trade in Services	9
IV	ALTERNATIVE APPROACHES TO LIBERALIZATION OF TRADE	10
1.	National Treatment and Supplementary Sectoral Agreements (FTA and NAFTA)	10
a.	NAFTA	13
2.	The OECD Codes	15
3.	Home Country Regulation/Mutual Recognition and Agreed Minimum Standards: Europe 1992	18
V	The Draft Uruguay Round Agreement on Services: National Treatment, MFN and a Framework for Negotiated Market Access	23
1.	Overview	23
2.	Content of the Draft Agreement	28
a.	Part I	28
b.	Part II	30
i.	MFN Treatment	30
c.	Parts III and IV	33
d.	Parts V and VI	35
VI	CONCLUSION	36

CHAPTER X: TRADE-RELATED INTELLECTUAL PROPERTY (TRIPS)

I	INTRODUCTION	1
1.	Fairness and Economic Welfare Justifications for Protection of	

	Intellectual Property Rights	2
	a. Fairness	3
II	ECONOMIC ARGUMENTS FOR THE PROTECTION OF INTELLECTUAL PROPERTY: THE PERSPECTIVE OF DOMESTIC WELFARE	5
	1. The Case of Developing Countries	6
	2. Introducing Trade Theory into the Argument	9
	3. A Global Welfare Perspective	10
	4. The Existing International Legal Framework	12
	a. The GATT	13
	b. The Paris Convention	14
	c. The Berne Convention	19
	d. The World Intellectual Property Agency (WIPO)	20
	e. Other International Agreements	21
	f. Limits of the Conventions and the Search for Alternative Approaches	22
	g. Aggressive Unilateralism: U.S. Trade Remedy Law and the EC New Trade Policy Instrument	23
	h. The Canada-U.S. FTA	27
	i. The Uruguay Round and Intellectual Property Rights	28
	i. Background	28
	ii. The Dunkel Draft Proposal	29
	j. General Principles of Intellectual Property Protection and the GATT System	30
	k. Obligations with Respect to Specific Forms of Intellectual Property	32
	i. Trademarks	32
	ii. Copyright	33
	iii. Patents	34
	iv. Other Forms of Intellectual Property	36
	l. Enforcement, Dispute Settlement, and Institutional Design	37
	i. Enforcement	37
	ii. Dispute Settlement and Institutional Arrangements	38
	m. Special provisions with respect to developing countries	39
	n. The North American Free Trade Agreement (NAFTA)	40
III	CONCLUSION	41
 CHAPTER XI: TRADE AND INVESTMENT		
I	INTRODUCTION	1
II	FOREIGN INVESTMENT AND TRADE THEORY	4

III	ECONOMIC RATIONALES FOR INCENTIVES AND DISINCENTIVES TO FOREIGN INVESTMENT	7
1.	Investment and Trade Protection	8
2.	The Dynamic Effects of Foreign Investment in Protected Markets	11
IV	NON-ECONOMIC RATIONALES AND EFFECTS OF INVESTMENT POLICIES: SOVEREIGNTY AND THE FOREIGN FIRM	13
1.	Defense and National Security	14
2.	Inadequate Regulatory or Political Control over the Foreign Investor	17
3.	Extraterritoriality	18
V	ALTERNATIVE APPROACHES TO INTERNATIONAL DISCIPLINE OF FOREIGN INVESTMENT MEASURES	22
1.	A GATT-Centred, Trade Distortion-Based Approach	22
a.	Investment Measures and the Existing Law of the GATT: An Overview	22
b.	The FIRA Panel Decision	25
i.	Local Content and Local Manufacturing Requirements	26
ii.	Export Performance Requirements	29
c.	The Evolution of the GATT Rules: TRIMs and the Uruguay Round	30
2.	National Treatment and the Right of Establishment: The FTA and the NAFTA	33
a.	Overview	33
b.	The FTA	33
c.	The North American Free Trade Agreement (NAFTA)	38
3.	The Codes of Conduct Approach: Negotiating the Rights and Responsibilities of Multinationals and Sharing the Costs and Benefits of Foreign Investment	40
VI	CONCLUSION	44

CHAPTER XII: TRADE AND DEVELOPING COUNTRIES

I	INTRODUCTION/CHRONOLOGICAL OVERVIEW	1
II	THE LEGAL AND INSTITUTIONAL FRAMEWORK FOR DEVELOPING COUNTRY TRADE	4
1.	The GATT	4
a.	Art. I	4
b.	Quantitative Restrictions (Arts. XI, XII, XIII, XVIII)	5
c.	Part IV	8
d.	Other GATT Provisions	10

	i.	The Tokyo Round Codes	10
	ii.	Dispute Settlement	12
2.		The Generalized System of Preferences and the Lome Convention	13
3.		The MultiFibre Arrangement(MFA)	17
4.		UNCTAD (The United Nations Conference on Trade and Development) .	21
	a.	The Generalized System of Trade Preferences	23
	b.	International Commodity Agreements and Export Earnings Stabilization	25
III		THE THEORY AND POLICY OF TRADE AND DEVELOPMENT	26
	1.	The Theory of Comparative Advantage and Economic Development: The Limits of Neo-Classical Theory	27
	2.	Trade and Development in the Import-Substitution Theories of the 50s and 60s	28
	3.	Dependency Theory and the Beginnings of a Neo-Classical Response to Import-Substitution Approaches	31
	4.	The LDC Debt Crisis	34
	5.	Trade Policy Reform at the End of the 1980s	38
IV		POLICY OPTIONS AND PROSPECTS FOR THE FUTURE	39
	1.	Unilateral Trade Liberalization	39
	2.	South-South Trade Liberalization	40
	3.	Regional Trading Arrangements Between Developed and Developing Countries	41
	4.	Multilateral Liberalization (the GATT)	41
	5.	Prospects	42
 CHAPTER XIII: TRADE AND THE ENVIRONMENT			
I		INTRODUCTION	1
II		ENVIRONMENTALLY-BASED TRADE MEASURES TAKEN TO PROTECT THE RESTRICTING STATE'S OWN ENVIRONMENT	4
	1.	Border measures, National Treatment, and the GATT	4
	2.	Art. XX: A GATT Environmental Charter?	5
	3.	The Jurisprudence of the GATT	8
	4.	National Treatment and the Relationship of Article III to Article XI . . .	15
III		TRADE MEASURES TO PROTECT THE GLOBAL ENVIRONMENTAL COMMONS	20
	1.	The Nature of the Problem	20
	2.	The GATT Jurisprudence	21
	3.	The Tuna-Dolphin Case	26

IV	FAIR TRADE AND THE RACE TO THE BOTTOM	38
V	NAFTA: A MODEL FOR NEW RULES ON TRADE AND ENVIRONMENT?	41
1.	Art. 104: Environmental and Conservation Agreements	42
2.	Chapter Nine: Technical Barriers to Trade	43
3.	Article 1114 — Environmental Measures	45
VI	CONCLUSION	49

CHAPTER XIV: THE INTERNATIONAL MOVEMENT OF PEOPLE

I	INTRODUCTION	1
II	THE VALUES	2
1.	Liberty	2
2.	Community	5
III	THE ISSUES	7
1.	The Size of the Intake	7
2.	The Composition of the Intake	9
a.	A Market in Entitlements	9
b.	Lotteries	10
c.	Queues (First-Come First-Served)	10
d.	Applicants Who Pose a National Security Risk	11
e.	Refugee or Asylum Claimants	11
f.	Economically Necessitous Aliens	12
g.	Family Members	13
h.	Culturally Homogeneous Aliens	14
i.	Better-Endowed and Less Well-Endowed Aliens	15
j.	Guest Workers	17
k.	Illegal Immigrants	18
IV	EMPIRICAL EVIDENCE ON THE WELFARE EFFECTS OF IMMIGRATION	19
V	CONCLUSION	24

CHAPTER XV: DISPUTE RESOLUTION IN INTERNATIONAL TRADE

I.	DISPUTE RESOLUTION MECHANISMS IN THE GATT	1
1.	Introduction	1

2.	A Description of the Present Dispute Resolution Mechanism	7
a.	The Principal Dispute Resolution Provisions of the GATT	7
b.	Standing	9
c.	Scope of Jurisdiction	11
d.	Prior Consultations	12
e.	Mediation and Arbitration	14
f.	Request for a Panel or Working Party	16
g.	Selection of Panelists and Determination of Terms of Reference	17
h.	Panel Procedures	21
i.	Adoption of Panel Reports by CONTRACTING PARTIES	24
j.	Implementation	25
3.	Perspectives on Dispute Resolution	28
II	DISPUTE RESOLUTION MECHANISMS IN THE CANADA-U.S. FREE TRADE AGREEMENT	38
1.	Chapter Eighteen	39
2.	Chapter Nineteen	44
III	DISPUTE RESOLUTION MECHANISMS IN NAFTA	51
IV	CONCLUSION	54
 CHAPTER XVI: CONCLUSION: THE FUTURE OF THE GLOBAL TRADING ORDER		
I	INTRODUCTION	1
II	UNFAIR TRADE	2
1.	The Nature of the Debate	2
2.	Trade Associated with Intrinsically Wrongful Acts or Practices	6
3.	Reciprocity and the Gains from Trade	7
a.	Diffuse Reciprocity	9
b.	Specific Reciprocity	14
4.	Race to the Bottom	19
III	INTEGRATING THE NEWLY LIBERALIZING COUNTRIES INTO THE GLOBAL TRADING SYSTEM	22
IV	MULTILATERALISM VERSUS REGIONALISM	35